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No. 09-767

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

BRIEF OF FURNITURE BRANDS INTERNATIONAL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
INTRODUCTION 2
BACKGROUND 5
A. The Statutory Scheme 5
B. FBN And The ITC's Chinese Bedroom Furniture Proceeding 9
REASONS FOR GRANTING THE PETITION 13
I. This Court Should Grant The Petition Because Of The Importance Of The Issue Presented, The Number Of Cases Affected, And The Clear Flaws In The Federal Circuit's Statutory Analysis 14
A. FBN Provided Extensive Assistance During The ITC's Investigation of Wooden Bedroom Furniture From China 14
B. The Federal Circuit Was Wrong To Equate Assistance With "Support" 16
II. The Government's Theory Of The Byrd Amendment Is Wrong, And Does Not Offer A Basis For Denying Certiorari 20
III. The Byrd Amendment Penalizes Protected Speech And Cannot Withstand First Amendment Scrutiny 22
CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Ad Hoc Shrimp Trade Action Committee v. United States, 515 F.3d 1372 (Fed. Cir. 2008) 7, 16

American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986) 6, 7

Belgium v. United States, 551 F.3d 1339 (Fed. Cir. 2009) 8

Berger v. United States, 295 U.S. 78 (1935) 19

Budd Co. Railway Division v. United States, 507 F. Supp. 997 (Ct. Int'l Trade 1980) 17

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) 23

Citizens United v. Federal Election Commission, __ S. Ct. __, No. 08-205, 2010 WL 183856 (2010) 25

Duferco Steel, Inc. v. United States, 296 F.3d 1087 (Fed. Cir. 2002) 7

Huaiyin Foreign Trade Corp. (30) v. United States, 322 F.3d 1369 (Fed. Cir. 2003) 8

NEC Corp. v. United States, 151 F.3d 1361 (Fed. Cir. 1998) 17, 18

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 25

Thornhill v. Alabama, 310 U.S. 88 (1940) 24

United States v. Eurodif, S.A., 129 S. Ct. 878 (2009) 16-17

STATUTES AND REGULATIONS

19 U.S.C. § 1516a(a) 18

19 U.S.C. § 1516a(b)(2) 17

19 U.S.C. § 1673 6

19 U.S.C. § 1673a 6

19 U.S.C. § 1673b(a) 6

19 U.S.C. § 1673b(b) 7

19 U.S.C. § 1673d(a)(1) 7

19 U.S.C. § 1673d(b) 7

19 U.S.C. § 1673d(c)(2) 16

19 U.S.C. § 1673d(c)(3) 7

19 U.S.C. § 1673e(a) 7, 16

19 U.S.C. § 1675 *et seq.* 8

19 U.S.C. § 1675c 20

19 U.S.C. § 1677(7) 7

19 U.S.C. § 1677(34) 6

19 U.S.C. § 1677(35)(A) 8

19 U.S.C. § 1677c 17

19 U.S.C. § 1677f(i)(3)(A) 17

Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c (2000)) 1, 2, 8, 20, 21

19 C.F.R. § 159.61 8

19 C.F.R. § 159.61(a) 20

19 C.F.R. § 159.63(a) 21

19 C.F.R. § 159.63(b) 21

19 C.F.R. § 159.64 20

19 C.F.R. § 207.2(f) 18

19 C.F.R. § 207.18 6

OTHER AUTHORITIES

Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814 (May 29, 2009) 9

USITC, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058 (Final), Pub. 3743 (Dec. 2004) 12

Wooden Bedroom Furniture from China, 68 Fed. Reg. 63,816 (Nov. 10. 2003) 9

Wooden Bedroom Furniture From China, 69 Fed. Reg. 77,779 (Dec. 28, 2004) 12

INTEREST OF *AMICUS CURIAE*

Furniture Brands International, Inc. ("FBN") is one of America's largest residential furniture companies. FBN owns many of the best-known brand names in the furniture industry, including Broyhill, Lane, Thomasville, Drexel Heritage, Henredon, and Maitland-Smith. At the time at issue here, FBN operated over 40 manufacturing facilities and employed nearly 20,000 workers across the United States.[1]

The Federal Circuit's decision has grave financial consequences beyond the parties in the case. FBN alone would recover nearly $25 million that has been set aside for FBN by U.S. Customs and Border Protection ("Customs"), but for the federal statute wrongly upheld by the Federal Circuit. *See* Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"), Pub. L. No. 106-387, tit. X, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c). In 2003 and 2004, FBN participated in an investigation by the International Trade Commission ("ITC") into whether imports of Chinese wooden bedroom furniture were being dumped and injuring U.S. domestic producers. As a result of the ITC's investigation and its own findings of dumping, the Department of Commerce ("Commerce") imposed

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than FBN and its counsel, made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for both parties received timely notice of FBN's intent to file this brief and have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

antidumping duties on Chinese furniture importers and collected tens of millions of dollars payable to domestic producers such as FBN. But because FBN did not express "support" for the imposition of duties in its written submission to the ITC, FBN is ineligible to receive the nearly $25 million of duties that has been set aside for FBN and otherwise would be paid to FBN. *See id.* § 1675c(b)(1)(A); *id.* § 1675c(d) (authorizing distribution of collected antidumping duties only to those "affected domestic producers" who either petitioned for or "support[ed]" a petition for antidumping duties).

In this brief, FBN explains why it did not support the imposition of duties on Chinese bedroom furniture. Those reasons involved classic political speech before a government agency. Moreover, even if viewed as "commercial" speech, the penalty that has been attached to that speech bears no relation to any governmental interest. FBN substantially assisted the ITC's investigation, and, as a qualifying domestic producer, FBN is directly harmed by the dumping found to exist. FBN submits that an understanding of its case will benefit the Court as it considers the important issues presented by the petition.

INTRODUCTION

If left undisturbed, the Federal Circuit's decision will preserve intact a statutory provision that penalizes speech based on its viewpoint. And the penalty is severe: the provision will cost firms that did not "support" petitions to lose hundreds of millions of dollars in distributions, as well as to

suffer in the marketplace by having to compete with firms who supported petitions and thereby received massive subsidies. This Court should grant the petition to rectify the constitutional and economic ramifications of the Federal Circuit's decision.

The Federal Circuit's error flowed from its fabrication of a statutory purpose for the Byrd Amendment divorced from the realities of antidumping investigations. According to the court, the fact that the Byrd Amendment conditions payment of distributions upon "support" for an antidumping petition is not an impermissible viewpoint-based restriction on speech because the Amendment furthers the purpose of "reward[ing] injured parties who assisted government enforcement of the antidumping laws." Pet. App. 33a. The court reasoned that because rewarding such speech amounts to "commercially contracting with [parties] to assist in the performance of a government function," *id.* at 40a, the Byrd Amendment constitutes a permissible regulation of "commercial speech," *id.* at 39a.

There are myriad flaws with this analysis, but among the most egregious is that the Federal Circuit equated a party's "support" for an antidumping petition to its degree of helpfulness to the government in enforcing antidumping laws. In so doing, the court below ignored an antidumping investigation's core purpose: to determine whether antidumping duties are necessary based on an impartial review of a carefully compiled record. Contrary to the Federal Circuit's supposition, the government's interest in enforcing antidumping laws

lies not in achieving a *particular* outcome – the imposition of antidumping duties – but rather in ensuring the existence of a fair enforcement process designed to reach the *correct* outcome. The Byrd Amendment does not further this interest; indeed, it undermines it.

When viewed through the lens of FBN's experience, this central flaw in the Federal Circuit's holding becomes clearly visible. In FBN's case, its views of its business and the state of the American furniture industry led it to oppose the petition for imposition of antidumping duties on Chinese bedroom furniture. But the fact that FBN opposed the petition does not negate the fact that FBN assisted the ITC in its investigation to the same extent as those domestic producers that supported the petition. If Congress intended to "reward" participants for providing assistance to the ITC, FBN richly deserved such a reward. Because the Byrd Amendment prohibits that outcome, it is apparent that the amendment was not intended to "reward" parties for assisting the ITC.

FBN's experience also illuminates the flaw in the reading of the Byrd Amendment urged by the government, which argued that the amendment was intended to identify and compensate those parties most injured by dumping. Pet. App. 30a. The ITC ultimately determined that exporters of Chinese bedroom furniture had injured the domestic furniture injury as a whole by dumping goods. As a member of the affected domestic industry – indeed, as one of America's largest residential furniture makers – FBN was among those parties directly

injured by this Chinese dumping. In fact, Customs determined that, but for the support requirement, FBN would be owed nearly $25 million in distributions from the duties collected on Chinese bedroom furniture.[2] Because the Byrd Amendment prohibits payment of the amount owed FBN, it is evident that Congress did not intend the amendment to direct compensation to parties most injured by dumping.

Stripped of these purported justifications, the true nature of the support requirement is laid bare: it is an arbitrary penalty on speech based upon its viewpoint. The Byrd Amendment *on its face* conditions payments upon a private party's naked expression of "support" for the imposition of antidumping duties. But as shown below, FBN's stated reasons for opposing the petition involved core political speech on matters of public policy. The Federal Circuit gravely erred when it classified such speech as sufficiently "like" commercial speech to warrant the penalties on it that the Byrd Amendment places. Moreover, even if a court could treat such statements as commercial speech, the amendment fails to pass the intermediate scrutiny applicable to laws curtailing commercial speech.

BACKGROUND

A. The Statutory Scheme.

In order to fully understand these cases, a brief statutory overview is useful. The "dumping" of goods

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[2] FBN filed suit against Customs and the ITC to recover these distributions, but proceedings in its suit have been stayed pending resolution of the instant *SKF* case.

occurs when an exporter sells goods in the United States at less than fair value. 19 U.S.C. § 1677(34). Customs will collect antidumping duties if (1) Commerce determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and (2) the ITC determines that a domestic industry will be harmed "by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation." 19 U.S.C. § 1673.

The process of obtaining an antidumping order usually begins when a party files a petition with Commerce and the ITC on behalf of a domestic industry alleging that the industry has been harmed by dumped goods. 19 U.S.C. § 1673a. In response, Commerce initiates an antidumping duty investigation. *Id.* Within 45 days of that date, the ITC must issue a preliminary determination as to whether a "reasonable indication" exists that an industry in the United States is materially injured or threatened with injury by reason of imports of the subject merchandise. *Id.* § 1673b(a). The ITC bases its preliminary determination on "questionnaire" responses from foreign producers, importers and domestic producers, and upon public conferences and post-conference briefs. *Id.*; 19 C.F.R. § 207.18; *see American Lamb Co. v. United States*, 785 F.2d 994, 998 (Fed. Cir. 1986).

If the ITC decides a reasonable indication of injury exists, Commerce then makes a preliminary determination whether a "reasonable basis" exists to "believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value."

Id. § 1673b(b). Commerce also issues a preliminary determination of the scope of the investigation. Within 75 days of that date, Commerce makes a final determination whether merchandise "is being, or is likely to be, sold in the United States at less than its fair value." *Id.* § 1673d(a)(1).

If Commerce makes an affirmative finding, the ITC makes a final determination whether a domestic industry is materially threatened or injured by the importation of that merchandise. *Id.* § 1673d(b). The ITC is required to consider several factors in making this decision, including actual and potential declines or negative effects in the output, sales, market share, profits, productivity, return on investments, utilization of capacity, cash flow, employment, wages, growth, ability to raise capital, and investment of the domestic industry. *Id.* § 1677(7). Its final determination "is based on technical and economic testimony given at a trial-like hearing." *American Lamb Co.*, 785 F.2d at 998-99.

Commerce can issue an antidumping order only if both Commerce and the ITC independently make affirmative final determinations. 19 U.S.C. §§ 1673d(c)(3), 1673e(a); *Ad Hoc Shrimp Trade Action Committee v. United States*, 515 F.3d 1372, 1375-76 (Fed. Cir. 2008). In the order, Commerce specifies which goods are subject to duties and their estimated duty rate. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089-90 (Fed. Cir. 2002). Commerce determines those duties by calculating the "dumping margin" for the subject merchandise, i.e., the total amount by which the price charged for

the subject merchandise in the home market exceeds the price charged in the United States. 19 U.S.C. § 1677(35)(A). Thus, the amount of duties can be specific to each foreign producer. Commerce then directs Customs to collect those duties on incoming goods. Commerce and the ITC periodically review whether dumping has occurred, the amount of the duty for each foreign producer, and the question of material injury. 19 U.S.C. §§ 1675 *et seq.*; *Belgium v. United States*, 551 F.3d 1339, 1341-42 (Fed. Cir. 2009).

Until 2000, antidumping duties collected by Customs were deposited with the Treasury for general expenditures. *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003). The Byrd Amendment transformed that regime by directing Customs to distribute collected antidumping duties to "affected domestic producers" that petitioned for relief or that "support[ed]" the petition. *See id.* (quotation marks omitted); 19 U.S.C. § 1675c(b)(1) (2001). Distributions are made on a pro rata basis to domestic producers based on the amount of "qualifying expenditures" – including expenditures on domestic manufacturing facilities, equipment, research and development, training, and technology – that the producer certifies it has incurred since imposition of the antidumping duties. *Id.* § 1675c(d)(3) (2001); § 1675c(b)(4) (2001); 19 C.F.R. § 159.61.

Due to litigation over the constitutionality of the Byrd Amendment, since December 2006 Customs has segregated but withheld distributions payable to domestic producers like FBN that submitted

"qualifying expenditures" but are ineligible for distributions solely due to the "support" requirement. Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,815 (May 29, 2009). If the Byrd Amendment is upheld, Customs will dispose of these funds to eligible domestic producers. *See id.* ("CBP will determine the proper recipients of these funds once certain legal issues are resolved.").

B. FBN And The ITC's Chinese Bedroom Furniture Proceeding.

In 2003, the ITC instituted an antidumping investigation of wooden bedroom furniture imported from China. *See* Wooden Bedroom Furniture from China, 68 Fed. Reg. 63,816, 63,817 (Nov. 10. 2003). Among the parties from which the ITC sought information in connection with this investigation was FBN. As one of the largest residential furniture manufacturers in America, FBN's assessment of the competitive market for bedroom furniture and the potential need to impose duties on imports allegedly being dumped from China obviously was significant.

In the questionnaire FBN was required to submit to the ITC, FBN was asked to check a box indicating whether it supported the imposition of duties, opposed, or took no position. FBN checked the box indicating that it was opposed. In the company's detailed questionnaire response (which included extensive financial information) and in subsequent testimony and briefing, FBN explained the basis for its position. Obviously, FBN's assessment of the industry was based only on its own view of market

conditions, without access to the confidential information of its domestic and foreign competitors and other market participants. But FBN opposed the imposition of duties for several reasons.

Fundamentally, FBN opposed the petition because it believed low-cost foreign competition was inevitable, FBN had made substantial investments to meet that competition, and FBN did not believe the domestic industry as a whole should hide behind the temporary and false protection of trade barriers. FBN explained that it was competing in the domestic market with furniture made not just in China but also in Indonesia, the Philippines, Malaysia, Vietnam, South Africa, and elsewhere. FBN advised that its understanding of the market was that production could be transferred relatively easily among foreign countries, so that if duties were imposed on Chinese furniture, production likely would shift to other Asian countries. As a result, FBN opined, American furniture manufacturers had no choice but to compete in an international marketplace, where many countries had lower labor and other costs than typically exist in America. As FBN framed the issue, "[t]he question put by this petition is whether we will rise to this challenge and learn how to compete globally, or whether we will retreat behind tariff-based walls."

FBN explained that it had made substantial investments so that it could succeed in this international marketplace even without temporary and ultimately ineffective trade barriers. One, it had cut costs at its domestic manufacturing facilities. For example, all of Broyhill's "Attic Heirlooms"

furniture collection was manufactured in North Carolina. As FBN explained to the ITC, "[b]y careful attention to its cost structure, Broyhill has been able to offer that product line at prices that are competitive with similar products brought in from offshore." Two, FBN had expanded its business through the careful use of products manufactured overseas and imported into America. This, too, required investment. As FBN advised the ITC, it had made substantial outlays to procure scheduling, shipping, and quality control services in the Far East, as well as access to laboratory facilities for product testing in China and the Philippines.

Thus, FBN reported that 80% of its sales of wooden bedroom furniture at that time were of furniture that had been made at one of FBN's 40 manufacturing facilities in America, while 20% of its sales were of furniture that FBN had imported from overseas. Of the 20% of sales of furniture made overseas and then sold in America, 14% of sales were of bedroom furniture imported from China, and the rest from other countries. But even though the overwhelming majority of FBN's bedroom furniture was produced domestically, and under the recently-enacted Byrd Amendment FBN could recover a share of any duties imposed on Chinese imports if it supported the petition to impose such duties, FBN's overall assessment was that trade barriers and duties were not the appropriate answer. Instead, FBN advocated in its responses to the ITC that domestic producers should be rewarded for making appropriate investments, as FBN had done, to meet the reality of foreign competition.

FBN, however, was only one participant in the ITC's proceedings. Ultimately, based upon all of the responses it received, the ITC decided that the domestic bedroom furniture industry – of which FBN remained one of the largest members – was being harmed by the dumping of Chinese bedroom furniture. *See* Wooden Bedroom Furniture From China, 69 Fed. Reg. 77,779 (Dec. 28, 2004).

The ITC based its decision on several grounds. It found that two-thirds of imports of Chinese bedroom furniture were by importers selling merchandise in direct competition with the domestic industry, rather than by domestic producers such as FBN that had adopted a "blended sourcing" strategy. *See* USITC, Wooden Bedroom Furniture from China, Inv. No. 731-TA-1058 (Final), Pub. 3743, at 24-26 (Dec. 2004). In addition, the ITC found that operating income margins had declined on the whole for domestic producers as a result of an influx of Chinese furniture. *Id.* Finally, relying on a wealth of proprietary and industry-wide data unavailable to FBN, Commerce (in its separate proceeding) determined that a substantial amount of this Chinese furniture was being dumped in the United States – i.e., sold at less than fair value; in turn, the ITC concluded that the domestic furniture industry had lost significant market share to these dumped imports. *Id.* at I-3 & 26.[3]

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[3] Ultimately, however, FBN's own Chinese suppliers were *not* assigned significant antidumping duties by Commerce, because they were not found to be selling goods at significantly less than fair value.

As FBN's story proves, a party's reasons for opposing, rather than supporting, imposition of duties have nothing to do with whether it "assisted" the ITC in its investigation or whether dumping "harmed" it. To the extent that dumped Chinese imports were injuring the domestic furniture industry, as the ITC ultimately found, and FBN incurred domestic "qualifying expenditures," FBN was impacted by Chinese dumping just as much as other domestic manufacturers. Once the government determined that duties were appropriate and ought to be collected and distributed to domestic producers, there is absolutely no reason why FBN should not recover its share of those duties, given that it forms a substantial part of the domestic industry the ITC determined to be injured by dumped imports. The Byrd Amendment does not allocate duties based upon a company's potential ability to withstand foreign competition, or upon its foresight (or lack of foresight) in responding to foreign competition, but rather upon its *advocacy position* as expressed in a public proceeding before the ITC. That statutory scheme is blatantly unconstitutional.

REASONS FOR GRANTING THE PETITION

The issue presented by the petition is substantial and affects hundreds of millions of dollars in numerous pending cases. As FBN recounts herein, its own experience illustrates that a party's "support" for antidumping duties bears no relation to its degree of usefulness to the government, and that the government's claim that the purpose of the Byrd Amendment is to compensate those companies most injured by dumping is untenable. FBN's example

furthermore shows that the amendment penalizes core political speech. The Court should grant the petition for certiorari.

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE OF THE IMPORTANCE OF THE ISSUE PRESENTED, THE NUMBER OF CASES AFFECTED, AND THE CLEAR FLAWS IN THE FEDERAL CIRCUIT'S STATUTORY ANALYSIS.

The Federal Circuit concluded that the Byrd Amendment's purpose is to "reward" participants in antidumping investigations for their assistance to the government. But this reading ignores the evident congressional policy behind antidumping investigations and the contributions made by parties such as FBN.

A. FBN Provided Extensive Assistance During The ITC's Investigation Of Wooden Bedroom Furniture From China.

FBN provided substantial support to the ITC in connection with the Commission's investigation of alleged Chinese dumping of wooden bedroom furniture in America. Although at that time FBN primarily manufactured its furniture domestically, it also imported roughly one-fifth of its furniture from abroad. FBN thus had a wealth of real-world experience regarding both the imported and domestic furniture markets to contribute to the ITC's investigation.

FBN assisted the ITC's investigation with its submission of two lengthy responses to the ITC's questionnaires, one in its capacity as a domestic producer and the other in its capacity as an importer.

The responses contained product descriptions and comparisons, FBN's analyses of the state of the furniture business in America, and a wealth of proprietary financial data covering FBN's production capacity, inventories, shipments, and costs of production. Preparing these responses, which together totaled more than 100 pages, cost FBN over $33,000 and consumed nearly 700 hours of work.

FBN's assistance did not end there. FBN sent a senior executive, Lynn Chipperfield, to testify at an ITC conference regarding the impact of Chinese bedroom furniture imports on domestic furniture makers. FBN later submitted written testimony from Mr. Chipperfield explaining FBN's assessment of the wisdom of imposing antidumping duties. After the conference, FBN also provided the ITC with briefing explaining its view that price resistance among U.S. consumers, not dumping by Chinese importers, was responsible for weakness in the domestic furniture market. FBN later submitted comments explaining how the ITC should modify its questionnaires to elicit complete information from domestic producers before reaching a final determination on whether to impose duties.

Throughout, FBN provided complete and detailed information and advice to the ITC that assisted the ITC's assessment of the domestic furniture market. Indeed, FBN did more than most "supporters" of petitions do to help the ITC and Commerce pursue their antidumping investigation. Even the company that sought antidumping duties on imports of bearings in the case before the Court did not make a significantly greater contribution to the ITC's

investigative process than FBN did: like Torrington, FBN submitted "scores of pages of sales data. . . , product descriptions and comparisons, detailed analysis of the [relevant] industry, and extensive proprietary financial data," and "appeared through counsel and submitted briefs to support its arguments" at ITC proceedings. Pet. App. at 10a, 45a. FBN's efforts far surpassed the contributions made by most other participants in ITC proceedings, whether supporters or not.

B. The Federal Circuit Was Wrong To Equate "Assistance" With "Support."

Although FBN's views ultimately did not prevail, its participation in the ITC investigation promoted one of Congress's central statutory purposes: to ensure that antidumping duties are imposed pursuant to a fair, evenhanded process.

"[A] multi-step process involving actions by both Commerce and the ITC must be completed before an antidumping order can issue." *Ad Hoc Shrimp Trade*, 515 F.3d at 1375-76. Each step of this process is larded with safeguards to ensure that an antidumping order issues against exporters only where the evidence truly warrants such action.

For Commerce to issue an antidumping order, two separate agencies – both Commerce and the ITC – must concur that such action is warranted. 19 U.S.C. §§ 1673d(c)(2), 1673e(a). Commerce must determine that dumping occurred, and the ITC separately must determine that dumped goods caused or threatened material injury to domestic producers. *Id.*; *United States v. Eurodif, S.A.*, 129

S. Ct. 878, 883-84 (2009). "This bifurcation reduces the risk that an improper bias will deprive importers of their due process rights." *NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998).

Each agency also is separately required to ensure fair procedures. Commerce's investigation proceeds in two phases: a preliminary determination and a final determination. The preliminary determination "triggers an opportunity for the affected parties to participate actively in the process." *Id.* Before reaching a final determination, Commerce must hold a hearing at the request of any interested party, and is "required by statute to address the arguments made at the hearing regarding the proper methodology for the dumping calculation." *Id.* at 1374; 19 U.S.C. § 1677c; 19 U.S.C. § 1677f(i)(3)(A). Throughout, Commerce must rely solely on information "presented to or obtained by Commerce during the course of the proceeding. Commerce may not base its decision on information outside the record." *NEC*, 151 F.3d at 1373; 19 U.S.C. § 1516a(b)(2).

Congress likewise bound the ITC to maintain a fair process. The ITC has an "affirmative obligation and duty" to conduct a "thorough investigation" in making its determinations. *Budd Co. Ry. Division v. United States*, 507 F. Supp. 997, 1001 (Ct. Int'l Trade 1980). The ITC must act as an impartial decision-maker. *See NEC*, 151 F.3d at 1371 (holding that parties before the ITC are entitled to procedural due process and that the "right to an impartial decision maker is unquestionably an aspect of procedural due process"). The ITC must base its

ultimate determination whether to impose duties on the record, and the record must include questionnaires submitted by those supposedly affected by the alleged dumping. *See* 19 C.F.R. § 207.2(f).

As an additional safeguard, Congress provided that parties may seek judicial review of an antidumping investigation in the Court of International Trade. 19 U.S.C. § 1516a(a). Decisions of that court may be appealed to the Federal Circuit and to this Court.

The cross-cutting checks laced through this statutory scheme prove that Congress's intent is not to railroad a finding that antidumping duties should be imposed. *See NEC*, 151 F.3d at 1370-71 ("there inheres in the statutory scheme created by Congress an implicit expectation that governmental decision makers will act honestly and fairly in the performance of their duties. . . . NEC is due a fair and honest process."). To the contrary, an antidumping investigation must be conducted before "fair and honest" decision-makers who may only determine whether to impose duties based on an impartial assessment of the record evidence before them. Congress's intent is manifestly to ensure that antidumping investigations reach the correct outcome, not a predetermined one.

The Federal Circuit imputed a purpose to the Byrd Amendment that destroys the studied neutrality of this statutory scheme. In its view, only "supporters" of petitions further the government's interest in enforcing antidumping laws. To analogize

to the criminal law, the Federal Circuit took the stance that because the government has an interest in enforcing its criminal laws, only prosecutors aid in the proper administration of those laws. But the fact that the government has an interest in enforcing its criminal laws does not mean that its goal is to achieve "as much imprisonment as possible." Rather, the government's "obligation to govern impartially is as compelling as its obligation to govern at all," and its "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Judges, juries, defense attorneys, and prosecutors all have important roles to play in that process of attaining justice – regardless whether in a particular case they believe that conviction and imprisonment are appropriate.

The Federal Circuit's contrary view of antidumping investigations wrongly equates *maximal* enforcement with *fair* enforcement, and would generate perverse results. By making only supporters of petitions entitled to receive distributions, the Byrd Amendment fatally biases the record before the ITC towards support of the petition – a result inimical to Congress's abundantly apparent interest in securing the even-handed enforcement of the antidumping laws. Because the Byrd Amendment undermines, rather than furthers, the purpose of antidumping investigations, the Federal Circuit erred by treating it as "advanc[ing] the government's interest in enforcing its trade laws." Pet. App. 45a.

II. The Government's Theory Of The Byrd Amendment Is Wrong, And Does Not Offer A Basis For Denying Certiorari.

The government presented a different and equally wrong theory of the Amendment's purpose to the Federal Circuit. According to the government, the Byrd Amendment's purpose was to "identify those producers suffering the greatest injury," Pet. App. 30a, and to compensate them. The Federal Circuit did not endorse the government's theory, and nor should this Court. As FBN's experience proves, injury from dumping bears no relation to whether a party supported the imposition of antidumping duties before the ITC. Because the government's justification for the Byrd Amendment fails to provide a colorable basis to support the Federal Circuit's ruling, this "injury" theory presents no obstacle to a grant of certiorari.

The Byrd Amendment specifies that assessed duties received by Customs must be distributed on an annual basis to affected domestic producers that have incurred "qualifying expenditures" subsequent to the issuance of an antidumping order. *See* 19 U.S.C. § 1675c; 19 C.F.R. §§ 159.61(a), 159.64. "Qualifying expenditures" means funds expended on domestic manufacturing facilities, equipment, research and development, training, technology, or health care benefits, as long as those expenditures relate to production of the product that was the subject of the antidumping order. 19 U.S.C. § 1675c(b)(4).

By tying reimbursement to expenditures, Congress intended to promote the purposes of the trade laws to provide a remedy for injurious dumping. As Congress stated in the findings justifying the Byrd Amendment, sustained dumping makes domestic producers "reluctant to reinvest or rehire," and may cause them to be "unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses . . . may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable." *See* Byrd Amendment, § 1002. Returning collected antidumping duties on a pro rata basis to domestic producers compensates those producers in proportion to their willingness to incur investments in capital, labor, and personnel. The Byrd Amendment thereby remedies some of the harm caused to those producers by dumping.

There is no dispute that FBN incurred hundreds of millions of dollars of such qualifying expenditures, and, absent the "support" requirement of the Byrd Amendment, it would be entitled to recover a substantial sum of collected duties. FBN documented and certified these expenditures to Customs. *See* 19 C.F.R. § 159.63(a)-(b) (requiring producers to enumerate and certify amount of expenditures claimed). After review and verification of FBN's submissions, Customs calculated that, but for the Byrd Amendment, FBN should receive $24,478,416.92 in distributions for the 2006-2008 fiscal years.

The fact that FBN did not "support" the antidumping petition in 2003 does not diminish

these qualifying expenditures by a penny. Conversely, if FBN *had* supported the petition in 2003, its qualifying expenditures would not have been a penny more. In short, FBN's support *vel non* of the antidumping petition bears no relation to the injury it has suffered through illicit dumping. Denying FBN compensation for these expenditures would subvert Congress's stated intent in enacting the Byrd Amendment – to finance out of collected antidumping duties the investments made by domestic producers in capital, labor, and personnel. No support exists for the government's theory that the Byrd Amendment somehow identifies and compensates only those producers that sustained injury from dumping. *See* Pet. App. 30a.

III. The Byrd Amendment Penalizes Protected Speech And Cannot Withstand First Amendment Scrutiny.

The Federal Circuit erred when it concluded that domestic producers involved in antidumping proceedings were effectively engaged in "commercial speech" when they expressed their support for or opposition to an antidumping petition, and when it concluded that the consequences of the Byrd Amendment were a permissible restriction on such commercial speech. Pet. App. 39a-40a. These holdings contravene this Court's established First Amendment jurisprudence on multiple grounds.

First, even if the Byrd Amendment were treated as a regulation of commercial speech, it still would fail to withstand the scrutiny applicable to such regulation. Commercial speech, which is "expression

related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980), only may be regulated if the government's interest is "substantial," the regulation "directly advances" the governmental interest asserted, and the regulation is "not more extensive than is necessary" to serve the interest asserted. *Id.* at 566. Even assuming that preventing dumping is a "substantial" government interest, the Byrd Amendment fails to directly advance that interest in a properly tailored fashion. Rather than reward all parties who assist antidumping investigations, it rewards only those parties who express "support" for a petition. But as noted above, a party such as FBN assists the government in enforcing the antidumping laws, regardless whether it supports or opposes the imposition of duties, through the detailed information it provides during the course of the investigation. The Byrd Amendment irrationally disregards these efforts and thus fails to meet even the *Central Hudson* test for legitimate restrictions on commercial speech.

Second, a producer's opposition to or support for an antidumping petition is *not* commercial speech (or "similar to" commercial speech, Pet. App. 40a), but rather is core political expression in a public proceeding before a government agency. FBN explained that imposing antidumping duties on Chinese bedroom furniture would not bring jobs to America or keep them here. Rather, new tariffs on Chinese imports merely would increase costs to

American consumers and shift imports to other countries such as Indonesia, Malaysia, and Vietnam. FBN argued that those companies that had taken steps to compete in the global marketplace should benefit from those investments without the artificial constraints on competition provided by trade barriers. FBN concluded that "[b]laming the Chinese for the inevitable consolidation of our industry is merely a distraction from our real challenge of remaining competitive," and that retreating behind "tariff-based walls" would not help the American furniture industry to learn to cope with global competition.

Such advocacy lies at the heart of the realm of political speech protected by the First Amendment from government censorship or penalty. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *See Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). The fact that FBN's statements concerned economic policy does not transform them into commercial speech or lessen the protection to which they are entitled. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political *and economic truth*. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." *Id.* at 95 (emphasis added). Indeed, FBN believed that the issues before the ITC were of sufficient public import

that it issued a press release detailing its reasons for opposing the petition.

FBN's example makes clear that the speech punished by the Byrd Amendment cannot sensibly be categorized as "commercial speech" or even as "similar to" commercial speech, as the Federal Circuit insisted. The amendment *on its face* penalizes parties based on the viewpoint they express regarding political and economic policy. Such a law cannot stand. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Federal Election Commission*, __ S. Ct. __, No. 08-205, 2010 WL 183856, at 19 (2010); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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